No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GEORGE PRICE, *et al.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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33 pp

QUESTION PRESENTED

Does the purpose prong of Section 5 of the Voting Rights Act prohibit the implementation of an unconstitutional, racially discriminatory redistricting plan that is not retrogressive?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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JURISDICTIONAL STATEMENT

OPINION BELOW

The decision of the three-judge panel of the United States District Court for the District of Columbia ("District Court") is reported at 7 F. Supp. 2d 29 (D.D.C. 1998). App. 1a.[1]

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[1] In this Jurisdictional Statement, filed on behalf of Defendant-Intervenors George Price, *et al.*, unless otherwise noted, citations are to the Appendix ("App.") filed with the Jurisdictional Statement of Janet Reno, *et al.*, on September 4, 1998 in the case of *Reno v. Bossier Parish School Board*.

JURISDICTION

The judgment of the three-judge panel of the District Court, which had jurisdiction pursuant to 42 U.S.C. § 1973c, was entered on May 4, 1998. The notice of appeal on behalf of defendant-intervenors George Price, *et al.* ("Defendant-Intervenors"), was timely filed on July 6, 1998. *See* Appendix attached hereto at 1a. This Court has jurisdiction over this appeal pursuant to 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o state shall . . . deny any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is reproduced in the Appendix. App. 244a-246a.

STATEMENT

I. INTRODUCTION

This is the second time that the redistricting plan for the Bossier Parish School Board ("Bossier" or "School Board") following the 1990 census has come before this Court. In 1997, this Court reviewed the grant of preclearance under Section 5 of the Voting Rights Act by a three-judge panel of the United States District Court for the District of Columbia.

The Court remanded this case to the District Court to apply the standard of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to the question of whether the Bossier Parish School Board had met its burden under Section 5 of the Voting Rights Act to prove that it did not adopt its redistricting plan with "the purpose . . . of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. *Reno v. Bossier Parish School Board*, 117 S. Ct. 1491 (1997); App. 29a-77a. This

Court directed that the existence of a "nonretrogressive, but nevertheless discriminatory, 'purpose' . . . and its relevance to § 5, are issues to be decided on remand." App. 46a.

Although two judges on the District Court panel on remand, Judges Laurence Silberman and James Robertson, concluded that the Board acted with "a tenacious determination to maintain the status quo" that diluted minority voting strength, they, nevertheless, granted preclearance. App. 7a. *See also* App. 25a. By failing to recognize this as a "non-retrogressive, but nevertheless discriminatory, purpose," the panel majority effectively held that an unconstitutional, racially discriminatory purpose does not violate Section 5 unless it actually worsens the position of minority voters.

The third judge on the panel, Judge Gladys Kessler, in dissent, concluded as follows, based on her reviews of the "extensive record" both in the original proceedings and again on remand: "Not only does the evidence fail to prove the absence of discriminatory purpose, it shows that racial purpose fueled the School Board's decision." App. 117a. *See also* App. 12a. Judge Kessler urged that the panel squarely address this Court's other question on remand, since under the Court's precedents, an unconstitutional purpose violates Section 5 regardless of whether it is retrogressive. App. 18a.

The panel majority's radical reworking of the standards governing review of discriminatory purpose under Section 5 conflicts with the plain language of the statute and this Court's clear precedents. It also poses a significant threat to effective administration of Section 5 in jurisdictions such as Bossier Parish, where such enforcement is most needed.

II. STATEMENT OF FACTS

The facts in this case are largely undisputed and are nearly all either stipulated or unrebutted. The majority and the dissenting opinions below reflect similar conclusions on the few factual disputes. On remand, the parties all agreed that the record should not be reopened for the taking of additional

evidence. App. 1a. Thus, the dispute in this case is not about the facts but about their legal significance in determining whether the Board met its burden to show that its redistricting plan was not motivated by a discriminatory purpose in violation of Section 5.

This Court's prior opinion in this case makes clear that the relevant factors are those discussed in *Arlington Heights*. Unrebutted evidence of discriminatory purpose, much of it in the form of stipulations, App. 145a-232a (¶¶ 1-285), addressed all of those factors: (1) "[t]he impact of the official action whether it 'bears more heavily on one race than another'"; (2) "[t]he historical background of the decision"; (3) "[t]he specific sequence of events leading up to the challenged decision [including] . . . [d]epartures from the normal procedural sequence"; (4) "[s]ubstantive departures . . . [from] factors usually considered important"; and (5) "administrative history" and other "contemporary statements by members of the decisionmaking body." 429 U.S. at 266-268. The facts with respect to each of these areas are summarized below.

A. The Effect of the Plan. In 1992, in response to the need to redistrict for one-person-one-vote purposes following the 1990 census, the School Board adopted a twelve single-member-district reapportionment plan with twelve majority-white districts. The Board's plan during the 1980's also had no majority black districts. By 1990, however, Bossier Parish, Louisiana had a population that was 20.1% black, App. 146a (¶ 5), and a voting age population that was 17.6% black. *Id.* at 2a. No black candidate, however, had ever been elected to the twelve-member School Board. *Id.* at 145a (¶ 4).

As the parties stipulated below, this is because voting in Bossier Parish is racially polarized. *Id.* at 201a-207a (¶¶ 181-196).[2] The foreseeable impact of the Board's adoption of a

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[2] The adverse effects of racially polarized voting on the ability of black voters to elect candidates of their choice are exacerbated in Bossier Parish by the effects of past discrimination. App.

redistricting plan with all majority-white districts, therefore, was to ensure that whenever black voters and white voters prefer different candidates, white voters' preferences will prevail, App. 119a-120a, perpetuating a racially "discriminatory status quo." App. 25a.

It was clearly possible, however, respecting traditional redistricting criteria, to draw a reapportionment plan for Bossier Parish that does not have *all* majority-white districts. App. 119a. The School Board stipulated that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," *id.* at 154a-155a (¶ 36), and that the outlines of a second such district in the northern part of the parish were "readily discernible." *Id.* at 194a (¶ 148). Admittedly, by fragmenting or "fracturing" predominantly black residential areas, however, the Board avoided drawing any majority-black districts. *Id.* at 190a-192a (¶¶ 137-138, 142). Indeed, on remand, Bossier conceded that "[t]he impact of [its] plan does fall more heavily on blacks than on whites," and, more specifically, that its election plan "did dilute black voting strength." Plaintiff's Brief on Remand at 12, 21.

B. The School Board's History. The School Board's history of discrimination against black citizens demonstrates why it wanted twelve majority white districts; so long as black voters had no voice, the School Board could safely ignore their concerns, and for decades this has been the case. As the majority below recognized when it examined this evidence on remand, "the intent [this history] proves . . . is a tenacious determination to maintain the status quo." App. 7a.

210a-216a (¶¶ 213-232) (past history of denial of access to political system); *id.* at 216a-218a (¶¶ 234-243) (history of discrimination in education). It was undisputed below that the depressed socioeconomic and educational levels of black citizens of Bossier Parish make it hard for them to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote; these factors in turn cause a depressed level of political participation. *Id.* at 207a-210a (¶¶ 197-202, 206-212).

The dark history of voting discrimination in Bossier Parish was undisputed below. App. 210a-216a (¶¶ 214-232); *id.* at 120a-125a. Likewise, the School Board admitted that it segregated its schools, actively resisted desegregation, and has never fully remedied its constitutional violation. In recent years, moreover, the School Board's student and faculty assignment policies have made its schools more racially isolated than they were when it unsuccessfully applied for unitary status in 1979. App. 216a-218a (¶¶ 231-243); *id.* at 123a-125a.

Black citizens have tried without success to alter these policies and practices. Bossier is required by federal court order to maintain a biracial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." App. 182a (¶ 111). The Board admitted that, for decades, it simply ignored this requirement altogether. *Id.* at 182a-183a (¶ 112). In 1993, the Board established a committee; but when black members made substantive suggestions, the Board unilaterally disbanded the committee. App. 184a (¶ 116); *id.* at 124a. As School Board members admitted, they did not want this committee getting into "policy" questions. *Id.* Even in the face of a federal court mandate to listen to the concerns of the black community, Bossier refused to do so. As a result, the black citizens of Bossier Parish are effectively cut off from any opportunity to have a voice in the operation of their public schools. Adopting a redistricting plan with twelve majority-white districts continued this pattern of exclusion. This history, as the majority found on remand, "provides powerful support for the proposition that . . . Bossier . . . resisted adopting a redistricting plan that would have created majority black districts." App. 7a.

C. The Sequence of Events Leading Up to Adoption of the Plan. The Board initially ignored requests by black leaders to participate in the redistricting effort, employing a process characterized by "public silence and private decisions." App. 128a. The redistricting process began in May 1991, when the Board decided to develop its own plan

rather than adopt the one previously accepted by the Police Jury.[3] Given the fact that the next School Board election was not scheduled until November 1994, there was no need for hasty Board action. *Id.* at 82a. The Board hired Gary Joiner, the cartographer who had drawn the Police Jury plan. *Id.* He was hired to perform 200-250 hours of work, far more time than would be needed simply to recreate the Police Jury plan. *Id.* at 173a-174a (¶¶ 86-87).

On July 29, 1991, the Police Jury plan was precleared by the Justice Department. App. 80a. The parties stipulated, however, that the Police Jury had provided incorrect and incomplete information in its Section 5 submission. For example, the Police Jury and Gary Joiner were "specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City." *Id.* at 154a, 160a-161a, 162a (¶¶ 36, 52-53, 57). However, they deliberately misled the public, *id.* at 161a-162a (¶ 54), the only black police juror, *id.* at 159a (¶ 47), and the Attorney General, *id.* at 165a-166a (¶¶ 65-66), by claiming that drawing any majority-black district was impossible. Despite these misrepresentations, some black community groups opposed the plan and specifically asked that their letter expressing concerns about it be included in the Police Jury's Section 5 submission. *Id.* at 147a, 165a-166a (¶¶ 11, 65-66). Joiner and the Police Jury did not include it. *Id.* Had the Police Jury made a complete and truthful submission, the Attorney General clearly would have denied preclearance.

School Board member Thomas Myrick participated in several private meetings with Joiner and white police jurors during this time. App. 82a; *id.* at 159a-160a, 172a-173a (¶¶ 48, 85). After these meetings, Myrick, who lives in an area that "would likely be included in any majority black district to be drawn in the northern part of Bossier Parish," *id.*

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[3] The Police Jury is the Parish governing body, comparable to a county council or commission in most states. App. 2a; *id.* at 145a (¶ 3).

at 160a (¶ 48), recommended that the School Board adopt the Police Jury plan. *Id.* at 174a (¶ 90). On September 5, 1991, however, the School Board decided *not* to adopt the Police Jury plan, largely because it would pit incumbents against each other. App. 125a. Over the course of the next year, School Board members considered a number of redistricting options. *Id.* Joiner met privately with School Board members and demonstrated different possibilities to them on his computer. *Id.* at 176a (¶ 96). These meetings were not open to the public; nor were there any recorded minutes or published notices of the meetings. *Id.*; App. 126a.

While the School Board was meeting and planning in private, the black community was trying, unsuccessfully, to participate in public. *Id.* In March of 1992, George Price, on behalf of a coalition of black community groups, wrote to the School Board asking to participate in its redistricting process. App. 82a; *id.* at 175a (¶ 93). Neither the Board nor the Superintendent responded to this request. *Id.* In August of 1992, Price sent another letter asking specifically to be involved in every aspect of the redistricting process. Again, the School Board made no response. *Id.* (¶ 94).

Frustrated by the School Board's unresponsiveness, Price contacted the NAACP Redistricting Project in Baltimore, Maryland. App. 177a (¶ 98). The Project was able to develop a partial plan for Price to discuss with the School Board. That illustrative plan consisted of two majority-black districts. *Id.* The plan did not show the other ten districts that made up the Parish. *Id.* When Price gave this information to a school district official, he was told that it would not even be considered because it only showed two districts. *Id.* (¶ 99). Price went back to the NAACP, and a complete twelve-district illustrative plan was drawn up. *Id.* Then, on September 3, 1992, when Price appeared on behalf of the black community at a Board meeting and presented a new plan showing all twelve districts, including ten majority-white and two majority-black districts, the Board dismissed it summarily, claiming incorrectly that it could not even consider any plan that split precinct lines. *Id.* at 177a-

179a (¶¶ 100-102). Until that time, however, the School Board had been actively considering alternatives to the Police Jury plan, almost all of which would have split precincts. *See* App. 107a; *id.* at 151a (¶ 23).

At the School Board's next meeting, on September 17, 1992, Price again presented the NAACP's illustrative plan. App. 179a-180a (¶ 106). Instead of discussing the plan with Joiner, or asking him to further analyze the possibility of drawing black-majority districts without splitting precincts (the School Board's purported reason for rejecting the plan, *but see id.* at 151a (¶ 23)), the Board responded by immediately passing a motion of intent to adopt the Police Jury plan. *Id.* at 127a.

On September 24, 1992, an overflow crowd attended the state-mandated public hearing on the redistricting plan. App. 85a. Fifteen people spoke against the School Board's proposed plan, most of whom objected because it would dilute minority voting strength. App. 85a; *id.* at 180a-181a (¶ 108). Not a single person spoke in favor of the plan. *Id.* At this hearing, Price also presented the Board with a petition signed by more than 500 Bossier Parish citizens, asking the Board to consider an alternative redistricting plan. *Id.* at 85a.

Despite the one-sided input from Bossier citizens, and despite the fact that the Board was under *no* time pressure to decide the issue, the Board voted, at its very next meeting on October 1, 1992, to adopt the Police Jury plan. As with the meetings of September 3 and September 17, 1992, the minutes of this meeting reflect virtually no substantive consideration of the Police Jury plan.

Board Member Myrick later testified that the Board adopted the plan that evening because it was "expedient." App. 128a. The Police Jury plan only became "expedient" when the School Board was publicly confronted with an illustration that alternatives to twelve white-majority districts were possible. *Id.* Faced with the growing frustration of the black community at being excluded from educational policy decisions and from the electoral process, the only way for the

School Board to ensure a plan with all majority-white districts was to adopt the Police Jury plan quickly, despite its other drawbacks. App. 128a; *id.* at 85a, 106a.

D. The Plan Adopted Compared to Traditional Districting Criteria. The Board, without explanation, adopted a plan that departs substantively from its earlier districting plans and ignores factors that it had previously considered paramount. App. 128a-129a. The plan forced incumbents to run against one another. *Id.* at 85a. It also created several districts that, according to its own cartographer, are not compact, *id.* at 191a (¶ 139), including Thomas Myrick's district, which contains almost half of the geographic area of the Parish. *Id.* (¶ 140). These districts do not track school attendance boundaries. In fact, some of them do not even contain a school. App. 85a; *id.* at 191a (¶ 141). However, they do split black communities, and all of them have a white majority. *Id.* at 190a (¶¶ 135-137). The panel majority below found that those departures from the Board's traditional districting criteria "establish[ ] rather clearly that the Board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise." App. 7a.

E. The Board Members' Contemporaneous Statements. The School Board "left virtually no legislative history" of its decision. App. 134a n.11. Three School Board members, however, made contemporaneous statements revealing the Board's discriminatory purpose. App. 83a n.4. School Board member Henry Burns told a black acquaintance that while he "personally favors having black representation on the board, other school board members oppose the idea." *Id.* The School Board offered no evidence denying or explaining this statement. School Board member Barry Musgrove told a prominent black leader that "while he sympathized with the concerns of the black community, there was nothing more he could do . . . on this issue because the Board was 'hostile' toward the idea of a black-majority district." *Id.* Finally, School Board member Thomas Myrick, who lives in an area that could readily accommodate

a black-majority district and contains two schools (both of which have student enrollments that are more than 75% black), told black leaders that he would not "let [them] take his seat away from him." *Id.*

F. The Board's Later Explanations of Its Motives. After the fact, the School Board sought to justify its actions with a flurry of explanations, including several that, even before this Court's remand, the majority below had found "clearly were not real reasons." App. 106a n.15. For example, the School Board argued that it adopted the Police Jury plan (on October 1, 1992) to comply with *Shaw v. Reno*, 509 U.S. 630 (1993) (decided June 28, 1993), even though *Shaw* was decided nine months *after* the Board adopted its plan. *Id.*

The School Board also reiterated its false claim that it could not adopt a plan without twelve majority-white districts because any such plan would require precinct-splitting, which it erroneously claimed violates state law. App. 135a. Throughout the redistricting process, however, the School Board was willing to split precincts for the protection of incumbents. *Id.* It was only *after* the black community presented its alternative plan that the School Board proffered the "no precinct-splitting" rationale. *Id.* Indeed, the majority below found that when "the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts." *Id.* at 107a. Furthermore, it was undisputed that splitting precincts does not violate state law; while the School Board itself may not split precincts, police juries have the authority to establish and modify precinct lines, and many do so when requested by a school board. *Id.* at 148a-151a, 164a (¶¶ 13-25, 60-61). The School Board did not request precinct changes from the Police Jury.

Nor did the School Board voice any concern in its initial submission to the Attorney General about a high number of precinct splits causing higher election costs. App. 136a. The Board never estimated the cost of splitting precincts before it voted to adopt the Police Jury plan. *Id.* Obviously, "cost"

did not actually motivate the School Board's decision at the time it was made. *Id.*

Bossier's final proffered justification for adopting the Police Jury plan was that it guaranteed preclearance; that is, the Attorney General would approve the School Board's plan because it was identical to the Police Jury plan that already had been precleared. App. 136a-137a. However, "guaranteed preclearance" was not the School Board's main objective; if the School Board's paramount concern had been preclearance, it would not have waited until October 1, 1992—almost 14 months later—to adopt the Police Jury plan. *Id.* If guaranteed preclearance was so important to the Board, it would have acted soon after the Police Jury plan was precleared by the Justice Department on July 29, 1991. *Id.* Moreover, adopting a plan with one or more majority-black districts certainly would not have made preclearance *less* likely.

III. THE PRIOR PROCEEDINGS

A. Administrative Preclearance Review. While the School Board had acted precipitously in approving its redistricting plan on October 1, 1992, the plan was not submitted to the Department of Justice for preclearance until January 4, 1993. App. 182a (¶ 110). After requesting additional information, the Attorney General interposed a timely objection to Bossier's plan. *Id.* at 233a, 185a (¶¶ 118-119). The School Board met in closed session and decided to seek reconsideration. *Id.* at 186a (¶¶ 120-122). The Attorney General denied this request on December 20, 1993. *Id.* at 238a, 187a (¶ 125).

B. The Declaratory Judgment Action.

1. The Initial Proceedings. On July 8, 1994, Bossier filed this action against the Attorney General in the United States District Court for the District of Columbia. A group of black voters in Bossier Parish, George Price, *et al.*, intervened as defendants in support of the Attorney General. The Defendant-Intervenors suggested below that the three-

judge court decide this case based solely on the issue of discriminatory purpose.

The Attorney General agreed that the evidence clearly established an unconstitutional discriminatory intent, but also argued that much of the same evidence also established a clear violation of Section 2 and that such a violation constitutes independent grounds for denying preclearance. The court below ruled that Section 2 analysis may not be incorporated into a Section 5 review. *Id.* at 89a-102a.

The majority, then Judges Laurence Silberman and Charles Richey, went much further, however, ruling that no "*evidence* of a section 2 violation" may be used to establish "discriminatory purpose under section 5." App. 101a (emphasis added). Ignoring the fact that much of the same evidence used in establishing a Section 2 violation is independently probative of discriminatory intent under *Arlington Heights* and other precedents of this Court guiding the inquiry into racially discriminatory intent or purpose, the majority flatly held that it would "not permit *section 2 evidence* to prove discriminatory purpose." *Id.* at 102a (emphasis added). As a result, the majority excluded from its consideration much of the evidence of discriminatory intent in this case.

The majority also erred by concluding that since it found that the School Board had "at least two . . . 'legitimate, nondiscriminatory motives,'" Bossier had met its burden of proof. App. 105a-106a (quoting *New York v. United States*, 874 F. Supp. 394, 400 (D.D.C. 1994)). The majority thus ignored the School Board's burden of producing some evidence that the proposed changes were not also motivated in part by an unconstitutional discriminatory purpose.

Judge Kessler, alone among the panel, considered the entire "extensive record" below and applied the *Arlington Heights* standard. She concluded that Bossier had failed to carry its burden of proving that it acted solely with "legitimate, nondiscriminatory motives." App. 116a (quoting *New York*, 874 F. Supp. at 400). Indeed, Judge Kessler, looking at all

the evidence, found that it "demonstrates overwhelmingly" that "racial purpose fueled the School Board's decision." *Id.* at 143a, 117a.

2. This Court's Decision. This Court upheld the District Court's unanimous conclusion that a Section 2 violation did not provide an independent basis for a denial of preclearance under Section 5, but vacated the majority's decision and remanded for the lower court to apply the *Arlington Heights* standard to *all* of the probative evidence of discriminatory purpose. App. 29a. The Court also directed the lower court to "decide[] on remand" whether there was any merit to the argument that Section 5's discriminatory purpose prong only reaches voting changes enacted with an intent to retrogress. App. 46a.

3. Proceedings on Remand. On remand, the majority (now Judges Silberman and James Robertson, who joined the panel after Judge Richey's death) "declined" to address the scope of Section 5's purpose prong, App. 3a, but then applied the *Arlington Heights* standard only to the question of whether the Board intended retrogression. Addressing only this issue, the majority concluded that Bossier had no retrogressive intent. App. 6a-7a.

Judge Kessler in dissent found that the majority erred in restricting the "§ 5 purpose inquiry to a search for intent to retrogress." App. 13a. She concluded that this "far too limited and narrow an inquiry" was not supported by the statute, its legislative history or the decisions of this Court. App. 24a, 14a.

Judge Kessler also again analyzed the voluminous evidence of the plan's impact and concluded that "it overwhelmingly demonstrates" that the plan dilutes black voting strength. App. 22a. Therefore, she found that the "majority's conclusion (that the School Board acted with an intent to maintain the discriminatory status quo) leads to denial of preclearance—under the purpose prong of § 5." App. 25a.

REASONS FOR NOTING PROBABLE JURISDICTION

THIS COURT SHOULD CORRECT THE SUBSTANTIAL LEGAL ERROR MADE BY THE MAJORITY BELOW IN LIMITING THE INQUIRY INTO THE EXISTENCE OF DISCRIMINATORY PURPOSE SOLELY TO A SEARCH FOR AN INTENT TO CAUSE A RETROGRESSION IN MINORITY VOTING STRENGTH.

The majority below erroneously limited its Section 5 discriminatory purpose inquiry to a search for an intent to retrogress. This unprecedented ruling (1) evades a central issue presented by this Court's remand; (2) departs from the controlling precedents of the Court; and (3) impairs Section 5 enforcement in jurisdictions like Bossier Parish in which its application is most vital.

A. The Court Below Erroneously Declined to Address the Issue Squarely Presented to It by This Court's Remand: Whether Bossier Had a Discriminatory, But Nevertheless Nonretrogressive, Purpose in Enacting its Redistricting Plan.

As Judge Kessler pointed out in dissent, this Court stated that, while it did not assume "that the Board enacted the Jury plan with some non-retrogressive but nevertheless discriminatory 'purpose', the existence of such a purpose, and its relevance to § 5, are issues to be decided on remand." App. 13a (quoting 117 S. Ct. at 1501 [App. 46a]). This instruction required the court below (1) to address the relevance of a "non-retrogressive, but nevertheless discriminatory purpose" to Section 5, and (2) to inquire into existence of such a discriminatory purpose in this case. *Id.* The majority, however, erred in expressly "declining" to carry out the first mandate from this Court and, as a result, failed to conduct the second inquiry either. App. 3a.

This is plainly error, for this case has never been about retrogression. As the majority acknowledged, before trial, the parties stipulated that the retrogression caused by the

Board's Plan was *de minimus*. App. 6a. Rather, the parties having stipulated to facts showing the dilutive impact of the plan on minority voting strength, the Defendant-Intervenors and the Attorney General focused at trial on rebutting Bossier's weak effort to show that this vote dilution was not intentional.

Instead of addressing the question presented by this proof and the Court's remand, the majority misinterpreted *Arlington Heights* by analyzing each factor tending to show discriminatory intent solely for the purpose of determining whether it showed an intent to retrogress. For example, the majority found that while "the historical background of the school board's adoption" of the plan "provides powerful support for the proposition that the . . . Board in fact resisted a redistricting plan that would have created majority black districts" and showed a "tenacious determination to maintain the status quo," it does not show the Board intended "*retrogression*." App. 6a-7a (emphasis added). Likewise, while the majority recognized that the "sequence of events . . . does tend to demonstrate the school board's resistance to the NAACP plan; it does not demonstrate *retrogressive intent*." *Id.* at 7a (emphasis added). While the Board's departure from traditional districting criteria also "establishes rather clearly that [it] did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise," according to the majority, "it is not evidence of *retrogressive intent*." *Id.* (emphasis added). Finally, the majority disregarded the statements of board members indicating discriminatory purpose because "[t]hey do not establish *retrogressive intent*." *Id.* at 8a (emphasis added). Thus, with respect to each type of evidence in this case, the panel majority erroneously failed even to undertake the central task on remand: determining under the *Arlington Heights* standard whether the Board had met its burden of proving that it did not adopt its dilutive, but non-retrogressive, plan in part for an unconstitutional, racially discriminatory purpose.

As Judge Kessler observes, it was error for the majority to "have limited their § 5 purpose inquiry to a search for intent to retrogress." App. 13a. By so limiting its inquiry, the majority misinterpreted *Arlington Heights* and Section 5. Judge Kessler, who has now twice properly applied *Arlington Heights* without limiting her inquiry to the search for a retrogressive intent, has twice found that the facts "overwhelmingly demonstrate" that Bossier acted with an unconstitutional, racially discriminatory purpose that was not retrogressive. App. 143a, 22a.

The majority also erred in assuming that if a legitimate rationale for the Board's action was not disproved, Bossier was entitled to preclearance, despite the presence of such a discriminatory purpose. App. 5a. While, as Judge Kessler noted, the two nondiscriminatory motives found by the majority are pretextual, App. 14a-15a, *see supra* Statement at II.F., even if they were legitimate, they would not support Section 5 preclearance applying the *Arlington Heights* "purpose" standard. This Court has left no doubt that proving discriminatory intent does *not* require proof "that the challenged action rested solely on racially discriminatory purposes." 429 U.S. at 265. The test is whether a discriminatory purpose "has been *a motivating factor* in the decision." *Id.* at 265-266 (emphasis added). Thus, the Board's burden of proof under Section 5 was to show the absence of discriminatory purpose. Neither the majority's incorrect finding that the Board had "legitimate, non-discriminatory motives" nor its inapposite conclusion that Bossier lacked a "retrogressive intent" is sufficient as a matter of law to meet this burden. App. 5a, 7a.

B. The Statute and the Decisions of This Court Make Clear that Section 5 Prohibits a Change in Election Procedures Adopted with an Unconstitutional Discriminatory Intent Whether or Not the Change Is Retrogressive.

Section 5's discriminatory purpose inquiry clearly extends beyond the search for retrogressive intent. Section 5 prohibits any unconstitutional discriminatory intent. Such an

intent may take the form of an intent to retrogress, but on the facts of particular cases, such as this case, it can take other forms. The plain language of the statute and the consistent case law interpreting it leave no doubt that the "purpose" inquiry under Section 5 should be coextensive with the *Arlington Heights* analysis. Indeed, there is no support for the proposition that Section 5 was intended to provide *less* protection against racial discrimination than does the Constitution.

By its terms, Section 5 forbids any voting change unless the covered jurisdiction establishes that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. These words echo the language of the Fifteenth Amendment: "The right of citizens . . . to vote shall not be denied or abridged . . . on account of race or color . . . ." Congress' use of constitutional language indicates that one purpose forbidden by Section 5 is the purpose of unconstitutionally diluting minority voting strength. *See* App. 57a (Breyer, J., concurring). There is nothing in the plain and unambiguous language of Section 5 to suggest that Congress intended a Section 5 court or the Attorney General to preclear a dilutive plan adopted with an unconstitutional purpose.

Given that the "starting point" for assessing discriminatory purpose under *Arlington Heights* is the impact of the proposed action, 429 U.S. at 266 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)), limiting the Section 5 discriminatory purpose inquiry to the existence of "retrogressive intent" would make that analysis redundant. What jurisdiction intending to retrogress would adopt a non-retrogressive plan? Likewise, since any plan with a retrogressive impact also would violate the effect prong of Section 5, the purpose prong would be superfluous.

This Court also has held repeatedly that intentional minority vote dilution is a harm against which Section 5 guards and that a prohibited discriminatory purpose need not be retrogressive. As Justice Breyer wrote in his concurrence

in this case, "the 'purpose' inquiry does extend beyond the search for retrogressive intent." App. 56a.

While the majority opinion purported to "leave open for another day" that question, the Court has answered it already, repeatedly and consistently. In 1966, the Court upheld the constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach*, 383 U.S. 301, and recognized that Section 5 extends at least as far as the Fifteenth Amendment. *Id.* at 334 (Section 5 requires a determination whether voting changes "would violate the Fifteenth Amendment"). *See also Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969). Subsequently, in cases like *City of Pleasant Grove v. United States*, 479 U.S. 462, 469-472 (1987), *Busbee v. Smith*, 459 U.S. 1166 (1983), and *City of Richmond v. United States*, 422 U.S. 358 (1975), the Court has been presented directly with and rejected the argument that Section 5 does not prohibit nonretrogressive voting changes enacted with an unconstitutional discriminatory intent.

In the first of these cases, *City of Richmond v. United States*, 422 U.S. 358 (1975), the Court remanded for a determination of discriminatory purpose where the election change had no retrogressive effect. In rejecting the argument that such a remand was unnecessary, the Court explained the obvious logical implication of its prior observations in *Katzenbach* and *Allen*:

> The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. . . . An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, *whatever its actual effect may have been or may be*.

422 U.S. at 378-379 (emphasis added).

Later in *Busbee v. Smith*, 459 U.S. 1166 (1983), the Court summarily affirmed a three-judge court's denial of Section 5 preclearance to a redistricting plan that was not merely nonretrogressive but actually ameliorative, in that it increased black voting strength. 549 F. Supp. 494, 516 (D.D.C. 1982). The district court explained that "[s]imply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of discriminatory purpose." *Id.* In its appeal to this Court, the state claimed that this was legal error,[4] but this Court rejected that argument and summarily affirmed the district court.

Yet again in *Pleasant Grove*, the Court rejected the argument that a nonretrogressive change could not violate the purpose prong of Section 5. The Court found that the city had failed to prove that its annexation of certain white areas lacked a discriminatory purpose. Despite the fact that the annexation lacked a retrogressive effect, the Court denied Section 5 preclearance. 479 U.S. at 472; *see also id.* at 474-475. (Powell, J., dissenting) (contending that the majority erred in holding that a discriminatory purpose could be found even though there was no intent "to have a retrogressive effect"). Thus, the limitation that the panel below set for itself of reviewing the evidence only for intent to retrogress is contrary to this Court's decisions rejecting the argument that Section 5 does not prohibit a nonretrogressive voting change enacted with an unconstitutional, discriminatory intent.

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[4] The questions presented in *Busbee* were:

> A. Whether a Congressional reapportionment plan that has no discriminatory effect, that enhances black voting strength, and that provides blacks with equal access to the political process can be deemed to violate Section 5 of the Voting Rights Act.
>
> B. Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act.

Jurisdictional Statement at i, *Busbee v. Smith*, 459 U.S. 1166.

This Court's more recent decision in *Miller v. Johnson*, 515 U.S. 900 (1995), confirms this long-standing view of the purpose prong of Section 5. In *Miller*, the Court expressly acknowledged its previous decisions, *see, e.g., Pleasant Grove*, 479 U.S. at 469, which recognize discriminatory purpose as a distinct basis for the denial of preclearance under Section 5. *See also Busbee*, 549 F. Supp. at 516-517; *City of Port Arthur v. United States*, 517 F. Supp. 987 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982).

The Court in *Miller* also relies upon *Beer v. United States*, 425 U.S. 130 (1975). In both *Beer* and *Miller*, the Court expressly reaffirmed that purposeful racial discrimination remains an independent basis for a Section 5 objection. In *Beer*, the Court held that "a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional." 425 U.S. 142 n.14. The Court in *Miller* reiterated that even an "ameliorative" plan can violate Section 5 if "the new apportionment itself so discriminates on the basis or race or color as to violate the Constitution." 515 U.S. at 923 (citations omitted). By now, therefore, it is well settled that in analyzing discriminatory purpose under Section 5, the question is whether the jurisdiction has established the absence of *any* unconstitutional discriminatory intent, not merely an intent to retrogress.

C. By Improperly Limiting the Section 5 Discriminatory Purpose Inquiry, the Majority Below Would Severely Undermine Effective Administration of Section 5 in Jurisdictions Such as Bossier Parish, Where Such Enforcement Is Most Needed.

In jurisdictions, like Bossier Parish, with poor disenfranchised minority communities, limiting Section 5's purpose inquiry only to cases already involving retrogression would insulate intransigent and damaging racial discrimination in the electoral process. However, Congress' fundamental purpose in enacting Section 5 was to keep jurisdictions like Bossier, with a long history of voting

discrimination, from finding new methods of perpetuating their discriminatory ways. H.R. Rep. No. 89-439, at 8-9 (1965); S. Rep. No. 89-162, pt. 3, at 13-15 (1965). To accomplish this, Congress shifted to covered jurisdictions the burden of proving the absence of discriminatory purpose or effect.

During the course of the hearings and debate on the Act, Congress found that prosecuting cases to enforce constitutional prohibitions against voting discrimination was lengthy and time-consuming. H.R. Rep. No. 89-439, at 9-11; S. Rep. No. 89-162, pt. 3, at 6-9. Moreover, even when cases were successfully prosecuted, effective relief was difficult to obtain; when discriminatory voting devices were eliminated, many of the jurisdictions found new ways to discriminate. H.R. Rep. No. 89-439, at 10-11; S. Rep. No. 89-162, pt. 3, at 8, 12.

Bossier Parish is precisely such a jurisdiction in which discriminatory patterns have been successfully perpetuated in voting, as in other areas, in part because of the inability of the local minority community to bring and maintain successful legal challenges. In such jurisdictions, Section 2 does not provide a remedy that most victims of voting discrimination can use effectively. As Congress recognized, the process is lengthy, time consuming and expensive, and the burden of proof rests on the plaintiffs, who like the Defendant-Intervenors here are often excluded from the redistricting process and denied accurate information. *See supra* Statement II.C.

Moreover, in Bossier Parish, such complex civil rights litigation has proven prohibitively expensive. The record here shows, for example, that the local black community was unable to force the Board to comply with outstanding desegregation orders. App. 216a-218a. As a result, the Board was able to ignore and to violate its court-ordered desegregation obligations. J.A. at 90-91 (Davis).[5] Likewise, the Bossier Parish Police Jury was able to enact a

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[5] Joint Appendix in *Reno v. Bossier Parish School Board*, Nos. 94-1455 and 95-1508.

discriminatory redistricting plan and falsely claim that it was impossible to draw any election districts containing a majority of black voters; no one in the local black community had the resources to unmask this misrepresentation until after the plan had already been precleared. *See supra* Statement II.C. In a poor, rural, racially divided community like Bossier Parish, Section 5 is our best hope for electoral justice, and fair elections are our only real hope for racial justice and equal educational opportunity.

In Bossier Parish, moreover, it would be virtually impossible to oppose preclearance if such opposition required a demonstration of a retrogressive effect. Most obviously, in terms of the number of election districts in which minority voters have a fair opportunity to elect their candidates of choice, it is impossible to retrogress from zero.

Moreover, for elected officials bent on discrimination, if minority voters already can elect no candidates of their choice, there is no need for further retrogression. Even if minority voting strength could have been more diluted mathematically, it could not have been diluted any more effectively. To condone the intentional perpetuation of such a situation would transform the Board's "extraordinary success in resisting integration . . . [into] a shield for further resistance." *Pleasant Grove*, 479 U.S. at 472. And, as this Court has held, "[n]othing could be further from the purposes of the Voting Rights Act." *Id.*

CONCLUSION

The evidence below, when fully considered as Judge Kessler did, "demonstrates overwhelmingly" that Bossier's action "was a thinly veiled effort to deny black voters a meaningful opportunity for representation on the School Board." App. 143a-144a. This action is unconstitutional and, therefore, violates Section 5.

The majority's contrary interpretation of Section 5's purpose prong, as prohibiting only the intent to retrogress, contradicts this Court's clear precedents. Therefore, the

Court should note probable jurisdiction and correct this substantial legal error.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BOSSIER PARISH SCHOOL BOARD, *Plaintiff,* v. JANET RENO, *Defendant,* GEORGE PRICE, *et al.*, *Defendant-Intervenors.*	Civil Action No. 94-01495 (CRR) (LHS) (GK)

DEFENDANT-INTERVENORS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all of the defendant-intervenors in the above named case, George Price, Leroy Harry, Thelma Harry, Clifford Doss, Jerry Hawkins, Odis Easter, Barbara Stevens King, Hurie Jones, Grover Cleveland Jaggers, Floyd Marshall, and Rubie Fouler, hereby appeal to the United States Supreme Court from the final judgment of the three-judge district court, entered on May 4, 1998, granting preclearance, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, to the plaintiff.

This appeal is taken pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

Respectfully submitted,

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July 6, 1998

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